

No. 18143

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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LAMA COMPANY, a corporation,

*Appellant,*

*vs.*

UNION BANK, *et al.*,

*Appellees.*

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APPELLANT'S REPLY BRIEF.

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JULIUS A. LEETHAM,

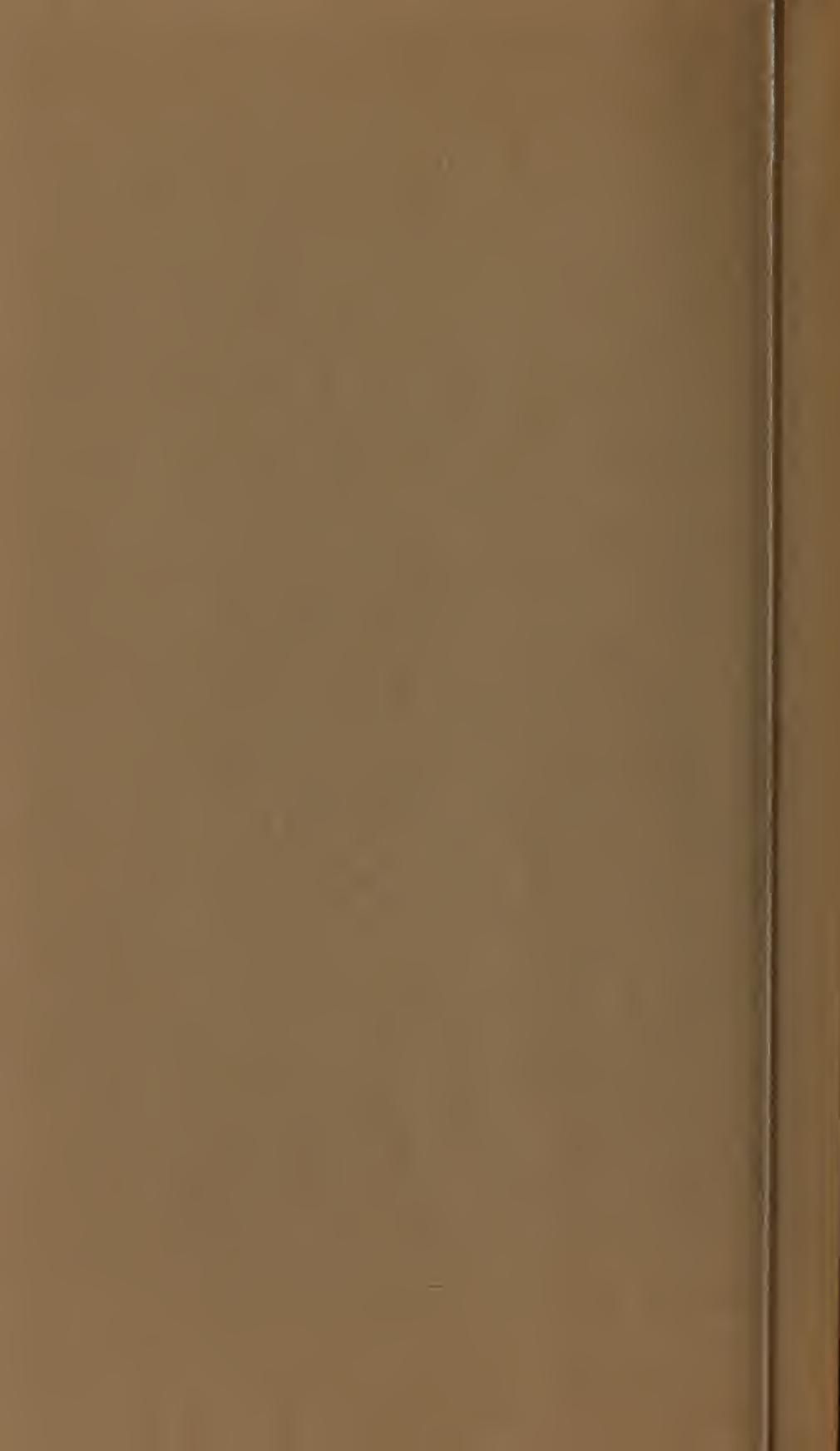
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### RESPONSIVE ARGUMENT.

The Appellee, Union Bank, Having Been Found Benefited by Reason of Proportional Occupation of Premises in Bankruptcy Should Be Held Responsible for Its Aliquot Share of the Rent Burden.

Both appellees make the triumphant assertion that no transcript of the oral proceedings in this matter has been presented for review. This is true. It is submitted, however, that the conclusion both appellees reach from this circumstance, *viz.* that appellant's record is fatally defective, is unsound. Rather, it would be fair to say that *the Findings of Fact made by the bankruptcy court are to be accepted as true, and supported by the evidence.* Neither review nor appeal having been taken by either appellee, certainly it is too late for the nebulous argument by appellee that the Referee should not have made specific findings. (See Appellee

Union Bank's Br. p. 9.) Surely, a party cannot sit idly by while participating in a proceedings, and permit evidence and determination contrary to his interests—then contend at a later time that the finding was improper.

It is important to realize, then that the following undisputed facts exist in this matter :

1. The rental accrual on the subject premises would have been \$2,105.28 for the period in question. [Tr. p. 42.]

2. The personalty in which the bankruptcy estate had an interest occupied only one-third of the premises; that in which appellant Union Bank had an interest, occupied two-thirds of the premises. [Tr. p. 41.]

3. The bankruptcy estate should be liable to the appellant for \$701.60, or one-third of the value of the premises for the period, plus certain specified minor charges. [Tr. pp. 41-42.]

4. The appellee Union Bank received value for the use of two-thirds of the premises. [Finding of Fact VI, Tr. p. 41.]

5. Full and adequate notice of appellant's "claim" against appellees was given by appellant's petition and order to show cause, as evidenced by appellees responsive pleadings. [Tr. pp. 2-16.] Both appellees were present and ably represented at the bankruptcy hearing. [Tr. p. 39.]

The appellee Union Bank confidently cites the well-reasoned case of *Evarts v. Eloy Gin Corp.*, 204 F. 2d 712, together with most of the citations contained in that case as determinative here. The scholarly classifi-

cation of *Evarts*, although helpful for a general evaluation of bankruptcy jurisdiction, presents a factual situation vastly different than the one here. The essential question determined negatively in *Evarts* was whether a suit in simple contract for services could be brought in a bankruptcy court by an individual non-bankrupt against other non-bankrupt individuals and corporations merely on the basis that a debtor proceedings (subsequently dismissed) had existed with respect to some of the corporations for a temporary period. Logically, the Court held that a “controversy” or a “proceeding in bankruptcy” could not be expanded to this extent. In this case, the bankrupt’s leasehold right was an asset of the estate until surrendered. The claim made and the actual finding of the bankruptcy court is to the effect that the partie’s appellee herein actually made a joint arrangement concerning the bankrupt estate’s personalty, and disposed of the same by joint auction. [Tr. pp. 3 and 40.] The personalty was disposed of by an auctioneer jointly engaged by the appellees. [Tr. p. 41.] The trustee undertook the protection of *all* of the personalty assets prior to the sale. [Tr. p. 40.] This is in no sense the *Evarts* case.

The appellant landlord was restrained in the bankruptcy proceedings from the use of his property. The Referee attempted to apportion responsibility for rent, during the applicable administrative period. The appellee Union Bank was part and parcel of this controversy or bankruptcy proceedings. Asserting title to personalty within the estate, the appellee Union Bank certainly had no right to stand aloof, claiming the estate’s property but attempting to avoid the burdens of such claim by special appearance. By the act of injecting itself

into the bankruptcy proceedings to reclaim and redeem its personalty rights, as a matter of logic, the appellee Union Bank had submitted itself to the bankruptcy court's jurisdiction. The bankruptcy court's error lay simply in declining to effectuate its own determination.

Respectfully submitted,

JULIUS A. LEETHAM,  
*Attorney for Appellant, Lama Company.*

#### Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JULIUS A. LEETHAM